Supreme Court, U.S.
FILED

No. 95 179

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Jose Mayorga-Perez,
Petitioner,

v.

Immigration and Naturalization Service,
Respondent.

Petition for Review to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an alien must accumulate seven years of unrelinquished domicile after becoming a permanent resident in order to be eligible for relief under Immigration and Nationality Act section 212(c) [8 U.S.C. section 1182(c)].

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OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit (Appendix, infra, pp. A-1 to A-8) is unreported. The decision of the Board of Immigration Appeals (Appendix, infra, pp. A-9 to A-15) is unreported.

JURISDICTION

The memorandum decision of the Court of Appeals for the Ninth Circuit was entered on March 23, 1995. Petitioner timely filed a Petition for Rehearing and suggestion for a rehearing en banc. The court below entered an order (Appendix, infra, pp. A-16 to A-17) denying the petition on May 1, 1995. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Immigration and Nationality Act

("INA") section 212(c) [8 U.S.C. section 1182(c)] provides in relevant part as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)).

STATEMENT OF THE CASE

On June 17, 1988, the petitioner was served with an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien ("OSC") issued by the Immigration and Naturalization ("INS"). The OSC charged that petitioner was subject to deportation pursuant to Section 241(a)(11) of the Immigration and Nationality Act ("INA") for having been convicted of a drug offense.

On January 18, 1989, petitioner filed

an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191) [so-called section 212(c) waiver] with the INS.

On April 4, 1989, a deportation hearing was held. Through counsel, petitioner admitted the allegations in the OSC. The Immigration Judge ("IJ") found petitioner deportable. In regard to petitioner's application for a section 212(c) waiver, the IJ held that since the petitioner had only been a lawful, permanent resident of the United States for five years and 10 months, in spite of his many possible equities in the United States, he was statutorily ineligible for a waiver of excludability and deportability under Section 212(c) of the Act and that his application for the 212(c) waiver would be denied. The IJ ordered that petitioner be deported to Mexico.

Petitioner appealed the decision of the IJ to the Board of Immigration Appeals ("BIA"). In its decision dated July 30, 1993, the BIA affirmed the IJ's decision.

On October 15, 1993, petitioner filed a petition for review of the order of deportation with the Court of Appeals for the Ninth Circuit ("Ninth Circuit") pursuant to 8 U.S.C. section 1105a(a). In a Memorandum decision filed March 23, 1995, the Ninth Circuit denied the petition for review (Appendix, infra, pp. A-1 to A-8).

STATEMENT OF THE FACTS

Petitioner was born on September 19, 1949 in Mexico. Petitioner first entered the United States during of summer of 1975. Petitioner and his wife SOCORRO SOLIS have seven children all of whom are United States citizens by birth, namely, CONRADO MAYORGA born May 16, 1976

in Los Angeles, California; SUSANA MAYORGA born October 18, 1977 in San Francisco, California; ERNESTO MAYORGA, born January 23, 1979, in San Francisco, California; JOSE MAYORGA, born March 30, 1986 in Stockton, California; LUIS ENRIQUE MAYORGA born July 24, 1987 in Stockton, California; SYLVESTER MAYORGA born August 22, 1989 in Lodi, California; and, MARIA VICTORIANA MAYORGA born August 3, 1991 in Stockton, California.

On June 2, 1977, the INS issued petitioner a "Silva letter" thus allowing him to remain in this country until his visa became available. On June 25, 1983, petitioner entered the United States, as a permanent resident.

On January 5, 1988, petitioner was convicted in the United States District Court, District of Arizona, of a drug offense and deportation proceedings were

thereafter initiated against him.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit conflicts with decisions in other court of appeals. [S. Ct. R. 10.1(a)]

In Castillo-Felix v. INS, 601 F. 2d 459 (9th Cir. 1979) the court, in a majority decision, gave deference to the INS' interpretation and held that to be eligible for 212(c) relief [8 U.S.C. section 1182(c)] aliens must accumulate seven years of lawful unrelinquished domicile after their admission for permanent residence. Id. at 467. In its decision below, the court felt compelled to follow the decision in Castillo-Felix. (Appendix, infra, pp. A-3 to A-4).

The position taken by the Ninth Circuit is directly contrary to that taken in other court of appeals. In

Lok v. INS, 548 F.2d 37 (2d Cir. 1977), the court held that aliens may possess a lawful domicile in the United States without being admitted for permanent residence and therefore 212(c) does not require aliens to accumulate seven years of lawful unrelinquished domicile after admission as a permanent resident. Id. at 40-41.

In Castellon-Contreras v. INS, 45 F.3d 149 (7th Cir. 1995), the court interpreted the meaning of "lawful unrelinquished domicile" under section 212(c). The court stated that "[i]n order to have a 'lawful domicile,' then, an alien must have the ability, under the immigration laws, to form the intent to remain in the United States indefinitely." Id. at 153. The court held that lawful domicile has a meaning distinct from lawful permanent residence (Id. at 153)

and that it could not "defer to the °BIA's interpretation of 212(c) because the plain meaning of the term 'lawful unrelinquished domicile' . . . does not lead to either an absurd result, or one at odds with Congressional policy" (Id. at 153). The court specifically disagreed with the Ninth Circuit when it stated that ". . . we cannot accept the contention, as does the Ninth Circuit, that Congress needed to more clearly indicate its intent to benefit these domiciliaries in this manner". Id. at 154. The court then concluded that aliens could become lawful domiciliaries without first obtaining lawful permanent residence status. Id. at 154.

CONCLUSION

This Court should review this case to establish uniformity in this important area of immigration law and establish

equal justice for all permanent resident aliens. For these reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: MAR 23, 1995

JOSE MAYORGA-PEREZ, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 93-70826 INS No. A37 735 952 **MEMORANDUM***

Petition to Review a Decision of the Board of Immigration Appeals

Submitted ** March 16, 1995
San Francisco, California

Before: NORRIS, WIGGINS, and FERNANDEZ, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Jose Mayorga-Perez appeals a decision of the Board of Immigration Appeals ("BIA") that he is statutorily ineligible for discretionary relief from deportation under section 212(c), 8 U.S.C. section 1182(c). We have jurisdiction pursuant to 8 U.S.C. section 1105a(a), and we deny Mayorga-Perez' petition for review.

I

Mayorga-Perez first argues that he is statutorily eligible for relief under section 212(c) because he entered the United States more than seven years before his deportation hearing. Section 212(c) provides discretionary relief from deportation to permanent resident aliens who have been lawfully domiciled in the United States for seven consecutive years. 8 U.S.C. section 1182(c); Tapia-Acuna v. INS, 640 F.2d 223, 224 (9th Cir. 1981). Seven years of lawful

unrelinquished domicile must be accumulated after an alien is admitted for permanent residence. Castillo-Felix v. INS, 601 F.2d 459, 467 (9th Cir. 1979). Although he first entered the United States in 1975, Mayorga-Perez did not obtain permanent resident status until June 25, 1983. Thus, at the time of his deportation hearing on January 18, 1989, Mayorga-Perez had been a lawful permanent resident for only five years and ten months, rendering him ineligible for relief under section 212(c).

Mayorga-Perez maintains that we should overrule our decision in Castillo-Felix in order to credit the time he spent in the United States prior to being admitted as a permanent resident. We are bound, however, by the law of this circuit absent en banc review or an intervening Supreme Court

decision.[1] Landreth v. Commissioner, 859 F.2d 643, 648 (9th Cir. 1988).

II

Mayorga-Perez next argues that the INS is estopped from denying his eligibility for relief under section 212(c) because his ability to obtain permanent status was delayed by government error. Although the Supreme Court has left open the question of whether an estoppel claim could ever succeed against the

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[1] Mayorga-Perez argues that because the statutory scheme of discretionary relief has changed, we may reinterpret the domicile requirement of section 212(c). The relevant portions of the statute, however, have not been amended.

Mayorga-Perez also argues that the BIA's development of an "outstanding equities" test in the context of 212(c) mandates that we revisit Castillo-Felix. This test, however, guides the exercise of discretion under section 212(c) once eligibility has been determined. Thus, this development has no bearing on our interpretation of the eligibility requirements.

government, it recently observed that "we have reversed every finding of estoppel that we have reviewed." Office of Personnel Mgmt. v. Richmond, 110 S. Ct. 2465, 2470 (1990). In any event, equitable estoppel may be invoked in immigration cases only "if the governmental conduct complained of amounts to 'affirmative misconduct'." Santiago v. INS, 526 F.2d 488, 491 (9th Cir. 1975).[2] Neither delay, negligence, nor neglect is sufficient to warrant estoppel. Mukherjee v. INS, 793 F.2d 1006, 1008-09 (9th Cir. 1986) (no misconduct where government official gave mistaken information to alien); INS v. Miranda,

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[2] In addition, a party asserting estoppel against the federal government must show that "the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." Mukherjee v. INS, 793 F.2d 1006, 1008-09 (9th Cir. 1986).

459 U.S. 14 (1982).

Here, Mayorga-Perez' application for permanent resident status was allegedly delayed because of an erroneous charging policy. Between 1968 and 1976, 144,999 Cuban refugees were granted permanent resident status pursuant to the Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (1966). The visa numbers assigned to refugees were charged against the Western Hemisphere immigration quota of 120,000 per year, making those visa numbers unavailable to applicants from Western Hemisphere countries other than Cuba. The Attorney General later determined that the Cuban charging was in error and an injunction was issued to force the recapture and reassignment of the visa numbers. See Silva v. Bell, 605 F.2d 978, 980-81 (7th Cir. 1979). Although

the INS' initial misinterpretation undoubtedly delayed many applications for permanent residence, a good-faith interpretation of a statute that results in such delay is insufficient to support an estoppel claim against the government.

III

Finally, petitioner argues that we should stay this petition for review pending the BIA's ruling on his motion to reopen. We have discretion to stay proceedings when a motion to reopen has been filed. Berroteran-Melendez v. INS, 955 F.2d 1251, 1254-55 (9th Cir. 1992). As in Berroteran-Melendez, however, we elect not to stay this proceeding because "the potential for abuse of the process to circumvent the BIA's discretionary power to grant or deny a stay of deportation pending a motion to reopen

outweighs concerns with efficiency." Id. at 1255.

Unlike a "petition for review, which automatically stays the order of deportation, an administrative motion to reopen filed with the BIA does not provide an automatic stay of deportation." Berroteran-Melendez, 955 F.2d at 1254 n.2. Rather, the BIA is given discretion to grant or deny a stay of deportation pending a motion to reopen. Consequently, the practice of suspending appellate proceedings under these circumstances "would effectively create an automatic stay of deportation pending the outcome of a motion to reopen," despite the statutory mandate that stays be discretionary rather than automatic. Id. at 1255 (citing Alleyne v. INS, 879 F.2d 1177, 1181-82 n.7 & 8 (3d Cir. 1989)).

The petition for review is **DENIED.**

U.S. Department of Justice

Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: Jul 30 1993

File: A37 735 952 - San Francisco

In re: JOSE MAYORGA-PEREZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Maurice Moyal, Esquire
1899 Clayton Road, Suite 100

ON BEHALF OF SERVICE:

Thomas L. Day
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. section 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Section 212(c) waiver of inadmissibility

ORDER:

PER CURIAM. The appeal is dismissed. We have reviewed the record of proceedings and have considered the respondent's contentions as advanced on his Notice of Appeal filed on April 14, 1989, and in his appeal brief filed on May 8, 1990. In his oral decision dated April 4, 1989, the immigration judge found the respondent deportable as charged under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. section 1251(a)(11), denied his application for a waiver of excludability under section 212(c) of the Act, 8 U.S.C. section 1182(c), and ordered him deported from the United States to Mexico. The decision of the immigration judge is affirmed based upon and for the reasons set forth in that decision. See Matter of Edwards, Interim Decision 3134 (BIA

1990); Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988); Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

We concur with the immigration judge that the respondent was statutorily ineligible for section 212(c) relief as lacking the requisite 7 years' lawful unrelinquished domicile. According to the Order to Show Cause issued on June 17, 1988, the respondent was admitted to the United States as an immigrant on June 25, 1983. On appeal, the respondent argues that he had the 7 years' lawful domicile required under section 212(c) dating from June 2, 1977, when he was granted protected status under Silva v. Bell, 605 F.2d 978 (7th Cir. 1979), modifying Silva v. Bell, No. 76-C 4268 (N.D. Ill. Oct. 10, 1978). Despite such assertion, we have consistently held that the acquisition of lawful domicile

time for the purpose of eligibility under section 212(c) must be subsequent to the date of admission as a lawful permanent resident. See Matter of Kim, 17 I&N Dec. 144 (BIA 1979); Matter of Newton, 17 I&N Dec. 133 (BIA 1979); Matter of Anwo, 16 I&N Dec. 293 (BIA 1977), aff'd, Anwo v. INS, 607 F.2d 435 (D.C. Cir. 1979); Matter of S-, 5 I&N Dec. 516 (BIA 1953); see also Chiravacharadhikul v. INS, 645 F.2d 248 (4th Cir.), cert. denied, 454 U.S. 893 (1981); Avila-Murrieta v. INS, 762 F.2d 1442, 1444 (9th Cir. 1984); Castillo-Felix v. INS, 601 F.2d 459, 467, (9th Cir. 1979). 1/

Further on appeal, the respondent

1/ Among the federal Courts of Appeal only the Second Circuit has held that "lawful domicile" for 7 years does not require "permanent residence" for that period insofar as enabling an alien to qualify for section 212(c) relief. See Lok v. INS, 681 F.2d 107, 108-10 (2d Cir. 1982).

maintains that the Immigration and Naturalization Service should be estopped from relying on the June 25, 1983, date as the date of his admission for lawful permanent residence, asserting that he would have been granted lawful permanent resident status years earlier but for the Service's alleged misconduct due to its delay in processing his visa application given the facts underlying Silva v. Bell, 605 F.2d 978, supra. 2/

2/ In Silva v. Bell, the Court of Appeals for the Seventh Circuit granted relief in the form of a program to recapture and reissue immigrant visa numbers that previously had been erroneously charged against the Western Hemisphere quota upon the adjustment of status of Cuban refugees to that of lawful permanent residents. 605 F.2d at 980-83. According to injunctions that were in effect until all available immigrant visas were reallocated in the case, the Service was not to undertake or pursue efforts to expel any alien who was a native of a Western Hemisphere country and who had a visa priority date between July 1, 1968, and December 31, 1976, provided he or she

As we previously have held, the Board and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. See Matter of Hernandez-Puente, Interim Decision 3153 (BIA 1991). Equitable estoppel is a judicially devised doctrine that precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, regardless of its substantive validity. M.D. Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st

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entered the United States prior to March 11, 1977. See Silva v. Bell, No. 76-C4268 (N.D. Ill. Nov. 9, 1979), enforcing 605 F.2d 978, supra; Silva v. Levi, No. 76-C4268 (N.D. Ill. April 1, 1977); see also Matter of Torres, 19 I&N Dec. 371 (BIA 1986); Matter of Pimentel, 17 I&N Dec. 482 (BIA 1980).

Cir. 1986). Estoppel is an equitable form of action with only equitable rights recognized. Keado v. United States, 853 F.2d 1209 (5th Cir. 1988). By contrast, this Board, in considering and determining cases before it, can only exercise such discretion and authority conferred upon the Attorney General by law. 8 C.F.R. section 3.1(d)(1) (1992). Our jurisdiction is defined by the regulations, and we have no jurisdiction unless it is affirmatively granted by the regulations. Matter of Hernandez-Puente, supra; Matter of Sano, 19 I&N Dec. 299 (BIA 1985); Matter of Zaidan, 19 I&N Dec. 297 (BIA 1985).

Accordingly, we have affirmed the immigration judge's decision.

David L. Milhollan
FOR THE BOARD

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: MAY 1, 1995

JOSE MAYORGA-PEREZ,	)	No. 93-70826
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
IMMIGRATION AND NATURALIZATION SERVICE,	)	
	)	
Respondent.	)	
	)	

Before: NORRIS, WIGGINS, and FERNANDEZ, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Wiggins and Fernandez have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

Supreme Court, U.S.
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No. 95-179

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSE MAYORGA-PEREZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the time an alien spends in the United States in a nonimmigrant status counts toward the "seven consecutive years" of "lawful unrelinquished domicile" required to establish eligibility for discretionary relief under 8 U.S.C. 1182(c) (1988 & Supp. V 1993).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-179

JOSE MAYORGA-PEREZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unreported, but the decision is noted at 50 F.3d 15 (Table). The decision of the Board of Immigration Appeals (Pet. App. A9-A15) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1995. A petition for rehearing was denied on May 1, 1995. Pet. App. A16-A17. The petition for a writ of certiorari was filed on July 31, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico who entered the United States in 1975. Pet. App. A3. On June 2, 1977, he acquired protected status as a result of the litigation that culminated in *Silva* v. *Bell*, 605 F.2d 978 (7th Cir. 1979), which enjoined the Immigration and Naturalization Service (INS) from taking any action to expel certain aliens who were from Western Hemisphere countries. Pet. App. A11, A13 n.2.[1] On June 25, 1983, petitioner became a lawful permanent resident alien. On January 5, 1988, petitioner was convicted of importing more than 50 kilograms of marijuana into the United States. See Certified Administrative Record (A.R.) 137, 219.

2. The INS thereafter charged petitioner with being deportable from the United States under 8 U.S.C. 1251(a)(11) (1982), as an alien convicted of violating a law "relating to the illicit possession of or traffic in narcotic drugs."[2] A.R. 219. Petitioner's deportation

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[1] Between 1968 and 1976, nearly 150,000 Cuban refugees were granted permanent residence pursuant to the Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, and those Cuban "adjustees" were charged against the Western Hemisphere quota of 120,000 visas per year. See *Silva* v. *Bell*, 605 F.2d at 981. The purpose of the injunctive relief in the *Silva* litigation was to recapture and reissue immigrant visa numbers assigned to Cuban refugees that had been erroneously charged against the Western Hemisphere quota. Pet. App. A13 n.2.

[2] This provision was renumbered by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 602, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. V 1993). The amendment does not apply to deportation proceedings, such as petitioner's, that were commenced before March 1, 1991. See IMMACT § 602(d), 104 Stat. 5082.

hearing took place on April 4, 1989. A.R. 139. At that hearing, petitioner conceded his deportability, but requested relief from deportation under Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988 & Supp. V 1993), under which the Attorney General may grant discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a lawful unrelinquished domicile [in the United States] of seven consecutive years."[3] A.R. 137, 142-143.

Although petitioner had not been a lawful permanent resident for seven years, he contended that he could satisfy the seven-year requirement by relying on his residency in this country before he became a permanent resident, because the INS had unlawfully delayed processing his application for an immigrant visa. Pet. App. A13. The immigration judge rejected that contention and found that petitioner had failed to meet the seven-year requirement. A.R. 137.

3. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. A9-A15. Relying on its consistent practice, and on *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979), the Board held that "the acquisition of lawful domicile * * * for the purpose of

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[3] Although Section 212(c) on its face authorizes the Attorney General only to admit aliens returning to a lawful domicile in this country, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also 16 I. & N. Dec. at 32 (Member Appleman, concurring) (noting that this interpretation of Section 212(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

eligibility under [8 U.S.C. 1182(c) (1988 & Supp. V 1993)] must be subsequent to the date of admission as a lawful permanent resident." Pet. App. A11-A12. The Board also rejected, as not within its jurisdiction, petitioner's claim that the INS should be "equitably estopped" from deporting him because of its alleged misconduct in delaying processing of his visa application. *Id.* at A12-A15.

4. The court of appeals denied a petition for review. Pet. App. A1-A8. Relying on *Castillo-Felix*, the court held that "[s]even years of lawful unrelinquished domicile must be accumulated *after* an alien is admitted for permanent residence." Pet. App. A2-A3. The court also rejected petitioner's claim that the INS should be equitably estopped from denying his eligibility for discretionary relief. The court explained that the "misconduct" on which petitioner relied to assert an estoppel—*i.e.*, the misapplication of the visa quotas that led to the *Silva* litigation—was based on a "good-faith interpretation" of the immigration laws. *Id.* at A6-A7.[4]

ARGUMENT

Petitioner renews his contention that the seven-year period prescribed by Section 212(c) of the INA may commence before the alien becomes a lawful permanent resident of the United States. The court of appeals correctly rejected that claim. Although the Second Circuit has rejected the Board's methodology for calculating the seven-year period under Section 212(c), petitioner would not be entitled to relief under the Second Circuit's decisions, or under the decisions of any other court of appeals. The Court has denied

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[4] Petitioner does not renew his estoppel claim in this Court.

review in other cases raising the same claim, and review likewise is not warranted in this case.

1. The language of the statutory provision, considered in light of the context in which it was enacted and the consistent course of administrative interpretation, supports the decision of the court of appeals. Section 212(c) of the INA provides only that "[a]liens lawfully admitted for permanent residence * * * who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." 8 U.S.C. 1182(c). The reference to the unrelinquished domicile as "lawful"—following closely on the initial clause, which limits the provision to aliens "lawfully" admitted for permanent residence—strongly suggests that an alien generally can establish the required residency period only by means of a domicile established after the alien is "lawfully admitted for permanent residence."

That reading of Section 212(c) gains support from the circumstances of its enactment. The provision—enacted as part of the INA in 1952, see INA, ch. 477, Tit. II, ch. 2, § 212(c), 66 Stat. 187—replaced the "Seventh Proviso" to Section 3 of the Immigration Act of 1917, which granted similar relief to "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 878. The Senate Report that preceded enactment of the INA made it clear that the purpose of the revised provision was to limit the Attorney General's discretion to grant relief to those aliens "who came in the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble." S. Rep. No. 1515, 81st Cong., 2d Sess.

382 (1950). To accomplish that purpose, Congress revised the "Seventh Proviso" of the 1917 Act in two ways: (1) by adding the initial clause, which limits eligibility to "[a]liens lawfully admitted for permanent residence"; and (2) by adding the adjective "lawful" to qualify the types of unrelinquished domicile that would qualify for discretionary relief.

The Board considered the interpretation of Section 212(c) shortly after the INA was enacted, in *In re S-*, 5 I. & N. Dec. 116 (BIA 1953). In that case, the Board reviewed the legislative history of the 1952 revision to the Seventh Proviso and concluded:

> [T]his provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118. The Board consistently has adhered to that interpretation. See, *e.g.*, *In re Anwo*, 16 I. & N. Dec. 293 (BIA 1977), petition for review on other ground denied, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979); *In re Newton*, 17 I. & N. Dec. 133 (BIA 1979); *In re Kim*, 17 I. & N. Dec. 144 (BIA 1979).[5] The Board's contem-

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[5] The Board has not, however, adhered to that interpretation in cases arising in the Second Circuit, in deference to the different interpretation adopted by the Second Circuit in the *Tim Lok* litigation, discussed below at pp. 7-8. See *In re Anwo*, 16 I. & N. Dec. at 298.

poraneous and longstanding interpretation is entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Power Reactor Dev. Co.* v. *International Union of Elec. Workers*, 367 U.S. 396, 408 (1961). Because that interpretation is reasonable, the majority of courts of appeals that have considered the question have sustained the Board's position. See *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979) (following *In re Anwo*); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 250 (4th Cir.) (following *In re S-*), cert. denied, 454 U.S. 893 (1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990).

2. Petitioner correctly notes (Pet. 6-7) that the Second Circuit adopted a different view in *Tim Lok* v. *INS*, 548 F.2d 37 (1977) (*Lok I*). Acknowledging the difficulty of the problem, see *id.* at 38, the *Lok I* court rejected the Board's interpretation and concluded that any unrelinquished domicile that did not violate the immigration laws would satisfy Section 212(c), even if the domicile was established while the alien was not lawfully admitted for permanent residence. See 548 F.2d at 39-41. In a second opinion dealing with Tim Lok's case, however, the Second Circuit substantially limited the import of its decision in *Lok I*. See *Tim Lok* v. *INS*, 681 F.2d 107 (1982) (*Lok II*). The court in *Lok II* explained that an alien can establish domicile in the United States only by "establish[ing] an intent to remain." *Id.* at 109. Furthermore, he can "establish[] a *lawful* domicile only when his intent to remain [is] legal under the immigration laws." *Ibid.* Because Tim Lok's initial presence in the United States was unlawful, he could not establish a lawful

domicile. Accordingly, the Second Circuit denied Tim Lok's petition for review.

The limited reach of the Second Circuit's rule is evident from decisions of other circuits that have recognized the differing approaches and yet, without deciding which interpretation should prevail, have consistently denied petitions for review of Board orders on the theory that nonimmigrant visitors cannot establish a "lawful" domicile. *Graham* v. *INS*, 998 F.2d 194, 195-196 (3d Cir. 1993) (temporary worker); *Madrid-Tavarez* v. *INS*, 999 F.2d 111, 112 (5th Cir. 1993) ("[A]n alien student, by the terms of his student visa, could not lawfully possess an intent to remain in the United States; but if the student did in fact form such an intent, then he was in violation of his visa and was not here lawfully."); *Brown* v. *INS*, 856 F.2d 728, 730-731 (5th Cir. 1988) (student visitor); *Melian* v. *INS*, 987 F.2d 1521, 1524-1525 (11th Cir. 1993) (visitor for pleasure); *Anwo* v. *INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); see also *Lok II*, 681 F.2d at 109 n.3 (noting that nonimmigrant students cannot acquire a lawful domicile).

Petitioner, as a beneficiary of the *Silva* litigation, similarly did not acquire a "lawful domicile" in the United States, because the effect of a "*Silva* letter" was not to render the alien's presence in this country *lawful*. On the contrary, "[t]he only 'right' the *Silva* injunction provided was the right to be temporarily free from deportation." *Ramirez-Durazo* v. *INS*, 794 F.2d 491, 498 (9th Cir. 1986); see also *Luciano-Vincente* v. *INS*, 786 F.2d 706, 709 (5th Cir. 1986) (noting that *Silva* letter simply "relieved [alien] from the threat of deportation while the injunction was in force"); *Marquez-Medina* v. *INS*, 765 F.2d 673, 675 n.2 (7th Cir. 1985) ("It is certainly clear that the injunc-

tion was not intended to confer any benefit other than postponing deportation"). Petitioner could not acquire a *lawful* intent to remain indefinitely in the United States—as required under the Second Circuit's approach—until he became a lawful permanent resident in June 1983. Accordingly, petitioner would not have prevailed even in the Second Circuit.

In recent Terms, the Court has denied certiorari in other cases raising a similar claim where the alien would have been ineligible even under the Second Circuit's test. See *Camacho* v. *INS*, 115 S. Ct. 65 (1994); *Okpala* v. *INS*, 114 S. Ct. 1217 (1994); *McBride* v. *INS*, 503 U.S. 959 (1992). There is no reason for a different disposition here.

3. Petitioner is wrong to contend (Pet. 7-8) that the decision below conflicts with *Castellon-Contreras* v. *INS*, 45 F.3d 149 (7th Cir. 1995). That case involved the distinct issue of whether an individual acquired a "lawful domicile" in the United States when he obtained "temporary resident status" under the amnesty provisions of the Immigration Reform and Control Act of 1986 (IRCA). See 8 U.S.C. 1255a(a); see also *Avelar-Cruz* v. *INS*, 58 F.3d 338 (7th Cir. 1995). The Ninth Circuit has distinguished its prior ruling in *Castillo-Felix*, and has agreed with the result reached by *Castellon-Contreras* in the context of the unusual amnesty provisions of IRCA. See *Ortega de Robles* v. *INS*, 58 F.3d 1355, 1360-1361 (9th Cir. 1995). Whatever the merits of *Castellon-Contreras* and *Ortega de Robles*, aliens subject to IRCA were not in the same position as petitioner. Unlike the temporary stay of deportation that a *Silva* letter afforded to petitioner, IRCA accorded the aliens involved a right to remain in the United States with a view to their becoming permanent residents.

See 8 U.S.C. 1255a(b); *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485, 2489-2490 (1993) Because petitioner was never a lawful temporary resident under IRCA, those decisions do not help him and do not counsel in favor of review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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